force of the enactment rests upon the later statute. Although the former act remains upon the statute-book and is not repealed, either expressly or by implication, it is no longer regarded as the law of the land in respect to new cases that may arise. The earlier act is merged in the amendatory act, and a repeal of the amendatory act does not revive the original act, but both fall together: *People* v. *Supervisors of Montgomery County*, 67 N. Y. 109. See also *Goodno* v. *Oshkosh*, 31 Wis. 127; *Kerlinger* v. *Barnes*, 14 Minn. 528; *Burwell* v. *Tullis*, 12 Id. 575; *Ely* v. *Holton*, 15 N. Y. 595. If, however, it appears that the legislature did not intend merely to repeat or copy the language of the original law, but, although using the same words, intended them to have a different meaning and effect, this rule is not applicable: *Kerlinger* v. *Barnes*, *supra*. Where, however, a subsequent act, providing that a certain section of a prior act shall thereafter read in a certain way, re-enacts some of its provisions, but omits others, it is a repeal of such omitted provisions: *The State* v. *Andrews*, 20 Tex. 230; *State* v. *Ingersall*, 17 Wis. 631; *Goodno* v. *Oshkosh*, 31 Id. 127; *Pingree* v. *Snell*, 42 Me. 55. The court, in *The State* v. *Andrews*, though it was not necessary to the decision of the cause, also laid down the rule, that the entire section thus re-enacted in the subsequent statute was thereby repealed. See, however, the cases already cited *contra*.

So, in *Ellis* v. *Paige*, 1 Pick. 45, it is said to be a well-settled rule that when any statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. See also *Blackburn* v. *Walpole*, 9 Pick. 104; *Pingree* v. *Snell*, *supra*.

But the doctrine that a statute is impliedly repealed by a subsequent statute revising the whole subject-matter of the first, is not applicable where the revising statute declares what effect it is intended to have on the former, as where it provides that such provisions of the earlier as are inconsistent with the later are repealed. In such case only such effect can be given to the revising act as it directs, and only the inconsistent provisions of the earlier act are repealed: *Patterson* v. *Tatum*, 3 Sawyer 164. See also *McRae* v. *Wessel*, 6 Ired. Law 153. So, where a chapter of a revision of general statutes repealed all acts and parts of acts the subjects of which were revived and re-enacted in the revision, or which were repugnant to its provisions, it was held that this must be construed as referring to general statutes, and not as repealing all provisions of village and city charters, previously enacted, which were in conflict with the general statutes contained in said revision: *Walworth County* v. *Village of Whitewater*, 17 Wis. 193; *City of Janesville* v. *Markoe*, 18 Id. 350.

M. D. EWELL.

Supreme Court of Michigan.

LAKE SUPERIOR IRON CO. *v.* CATHARINE ERICKSON.

Where a mining company let a contract for taking out a certain quantity of ore, but employed persons of supposed skill to watch for dangers from loosened rocks, and in other ways retained a control over the mode of mining, and a servant of the contractors was killed by the falling of a rock, the danger from which ought to have been detected and guarded against: *Held*, that the mining company was responsible.

The question of negligence is generally one of fact, not of law.

It is not contributory negligence for a servant to go into a dangerous place in deference to the opinions of others who are supposed to have, and by their positions are bound to have, special knowledge which should enable them to judge of the dangers more accurately than the servant himself.

THE defendant in error recovered a judgment, in the court below, as administratrix of her deceased husband, Andrew Erickson, who was killed by a falling rock, while engaged in working in the mine of the plaintiff in error, July 9th 1877.

It appeared that Erickson had been employed, the day before his death, as one of a mining gang, under the management chiefly of Gustav Stenson, who, with his partners, had taken a contract for mining and hoisting ore, at ninety-five cents per ton for ore, and twenty-five cents per ton for rock. This contract having been made July 1st 1877, for a month, and similar contracts having been made in previous months, from the beginning of April. Erickson was employed by the day, at $1.50 per day. The pay arrangement was, that the company officers were to pay the men on the certificates of the contractors, deducting this pay from the final settlements.

These contracts were all let by Day and McEncroe, as officers of the company, who had general charge, for the company, of the affairs in the mine.

The pit where these contractors were at work had been carried along the lode so as to leave the upper or hanging wall, which was at an angle of sixty-five degrees, exposed from twenty to twenty-five feet high, and not far from the same distance along the level, with no support or timbering of the hanging wall in that space. Erickson was engaged in sinking a winze or ventilating shaft from this level, and had sunk it about two feet and eight inches when killed. The rock which killed him fell from about half way up the hanging wall, and was just over the winze.

The chief controversy related to the question whether this rock was previously in a condition which made it so apparently dangerous as to require removal or timbering; and, if so, on whom, if any one, was the risk and responsibility?

The opinion of the court was delivered by

CAMPBELL, J.—Upon a careful inspection of the record we do not think any questions become material except those which bear on the rights and duties of the various parties in connection with the mine.

The other errors assigned do not appear to be founded on sufficient showing in the record. The only one urged by counsel was the rejection of a question put on cross-examination to Stenson, asking him whether it was not his business, and that of his associates, to be on the lookout and watch for dangerous places. We think that, when the terms and conditions of his contract were shown, this was rather a deduction than a fact, and he could not properly be allowed or required to answer it. He was not precluded from explaining fully the mutual understanding of the contracting parties as to what the contract was, or as to usage.

It was claimed on the argument and this claim is based on the assignments of error, that on the whole case there was no ground of recovery. And as reasons for this position several legal propositions are advanced, which are chiefly as follows: that there could be no recovery if Erickson was in the employ of Stenson as a day laborer; or if he was not under control of the company or its officers, and if Stenson and his associates were to mine and do their work properly; or if he was willing to work after such examination as was shown. And it was claimed in various forms that Erickson undertook all the risks that were established. It will be more convenient to refer to the points raised in the way adopted by counsel, than to pursue every sub-division separately.

There was evidence that the rock in question had been considered as dangerous some time before the contract of July, and that the attention of Day and McEncroe had been called to it. There was evidence of various attempts, by sounding it with an iron bar, to ascertain its safety. There was conflicting evidence as to some of the declarations of the mining officers on this subject. There was evidence on one side that they expressed themselves decidedly on its safety. There was also evidence to go to the jury that they retained the right to determine what large rocks should be removed and what timbering or propping should be done. There was also testimony of the increase of water oozing from the seams, claimed to indicate a gradual loosening. The theory of plaintiff in error was that the rock had been started by blasts from the winze, and that sufficient care had not been taken to examine it thereafter. It fell about two hours after a blast. Other matters of fact will be referred to in their place.

It is proper first to consider the respective positions of the parties. Day and McEncroe stood in the place of the mining company in

making these contracts. There was no employment relation between them and Erickson, who was laboring under the contractors. So far as this changed the relative liabilities of the parties it must operate in this case. But while there are cases in which there is no legal duty or privity between principals and the servants of those who contract with them, this lack of privity is not universal and absolute. If, for example, a railroad company were to contract with a firm of car-builders to build cars according to given plans in places under the entire control of the builders, there could be no possible corporate responsibility for injuries received by workmen in their callings. But on the other hand it might be quite possible for men to be employed in piece work in the shops of such companies where they retained more or less control, when for the failure of a corporate duty the workmen or strangers injured by that failure might have a cause of action for the wrong directly against the corporation, although it had not employed them. The case of the *City of Detroit* v. *Corey*, 9 Mich. 165, is a case where the corporation was held liable for neglect of a contractor in not properly guarding against danger from an excavation in a public street. The same principle was applied in *Darmstetter* v. *Moynahan*, 27 Mich. 188; *Mc Williams* v. *Detroit Central Mills Co.*, 31 Id. 274; *Gardner* v. *Smith*, 7 Id. 410; *Bay City & E. Sag. Railroad Co.* v. *Austin*, 21 Id. 390; *Continental Imp. Co.* v. *Ives*, 30 Id. 448; *G. R. & Ind. Railroad Co.* v. *Southwick*, 30 Id. 444.

No doubt the range of the owner's responsibility is very much less in most cases where contractors are employed and have their own servants at work than where the servants are employed by the proprietors. The main question in such cases is whether any duty remained which sprang from the proprietor's own position, and from the violation of which the damage arose. In the present case there are two principal inquiries, which are (1) whether the death of Erickson was due to the fault of the mining company in not doing what they were bound to do for the protection of those working in their mines: and (2) whether Erickson himself was responsible for running the risk which proved fatal. Of course both of these questions are aside from the third question, whether the death was accidental, and not due to the fault of any one.

The court below told the jury that there could be no recovery in this case if the duty was on Stenson and his associates to guard against such risks, and that the same was true if Erickson contrib-

uted to the injury by his own want of care. They were also told that there was no ground of recovery if the falling of the rock was not under circumstances which showed that the company had been guilty of such negligence as showed such want of care and caution as prudent persons would not be guilty of. They were particularly directed that unless the conduct of Day and McEncroe was thus negligent and the cause of the mischief, there could be no recovery, and that the company would be liable for their neglect or misconduct and not for that of any one else appearing in the case.

We think the court was correct in holding that Day and McEncroe represented the company for this purpose. They appear to have had entire control of all the business that is involved in the record, and we think there is no room to question the propriety of these rulings if they were applicable, and not neutralized by other instructions. In this connection it is proper to notice one of the special assignments of error which is calculated to give a wrong impression. The court is represented as telling the jury to inquire whether the company used such care and precautions as "relieved them from liability in this suit," and it is claimed this left a question of law to the jury. But the next sentence of the charge explained what would or would not make them liable. Isolated sentences cannot be allowed to be considered apart from their context. The instructions were not so separated as to create confusion, but were really but a single and correct ruling.

We think that unless the case was one too plain to go to the jury on that point, it was properly left to them to say whether the accident occurred without any one's fault or neglect. It is not for us to draw inferences of fact in such cases. There was certainly evidence to go to the jury indicating that there should have been measures taken by some one to either remove or prop the rock that fell.

We think also that there was properly before them a question whether Erickson himself was guilty of contributory negligence. A great deal of testimony was introduced to show that there was no apparent danger which could be discovered, and that the company was justified in treating the rock as safe. There was also much testimony to the contrary. The place was one not easily examined by the ordinary mining lights. If there was no apparent danger it was not recklessness to work under this rock. If, on the other hand, there was real danger, and Erickson was informed

of it on the day he entered the mine, there was nevertheless evidence that those about him who had practical knowledge of the mine in which he was a stranger, acted as if they did not think so, and the guards, usually expected against danger, were absent. The duty of examining such places after a blast is confined by the testimony to dangerous places, and not made out clearly even there as devolving on Erickson. The jury have necessarily found he was not careless, and there was testimony on which they could lawfully act.

The question next arises whether the responsibility of protecting Erickson from such a danger, if supposed to exist, rested on his immediate employers. This was also dependent on testimony, and involved some inquiry into their relations with the company.

Does it then appear so to bind the court and jury that the contractors in this particular service had the responsibility confined to them of guarding their workmen from the probable dangers of their employment? There is no dispute in this case upon the general principle of law that a responsibility lies somewhere to prevent workmen from being exposed without such protection as is reasonably required in a dangerous business. The law is very clear that it is culpable negligence to avoid keeping mining works as well protected as usual prudence would dictate. And there is no doubt that a common danger in mines is from falling rocks. The hanging wall being on an angle—in this instance of sixty-five degrees—with the level, any lack of cohesion in its parts must lead to the fall of such part of it as is seriously loosened, and that fall must be hastened by the concussion of the air or the blows of flying rocks thrown against it by blasting below and near it. In the present case the rock which fell being directly above the winze, and only about twelve feet from its mouth, every blast in that shaft would necessarily throw more or less rock against this sloping roof; and this must continue until the shaft is either finished or opened to such a depth as to deaden or destroy the upward force of the explosions.

The fact that this rock was considered dangerous, and so reported several weeks before the accident, and the further fact if true (and the jury probably believed them) that there was a perceptible increase in the dangerous symptoms, certainly imposed a duty of either removing the real dangers or using such means as are generally deemed adequate to determine whether any danger existed. The further fact that the hanging wall was composed of a species

of rock whose thickness was not found generally uniform, and which was sometimes thin enough to possess no very great resisting power to shocks of disintegrating agencies, was one which could not be left out of view by any prudent calculation. A broad expanse of some twenty-five feet square of rock, only supported by its own cohesive power from falling, may, according to the testimony, have weak points where it may give way unless propped, or unless the unreliable mass is removed. There was testimony, which it is not our province to pass upon, which indicated, if believed, that no reliable test could be found for determining the solidity of the rock when water was escaping through such seams as existed in this wall.

We think there was a question fairly open whether neglect to guard against the accident was not culpable. The jury have found it was.

If so, the only remaining question is whether the jury had proof before them whereby they could lawfully hold the company to this responsibility.

Under the contracts shown by the proofs, the contractors had nothing to do with planning the mine or selecting their working ground, unless with very small discretionary choice. The shafts and levels and the winze must necessarily have been determined on by the owners of the mine, and the mining gang worked on short contracts. Their business, except in sinking the winze, was merely stripping the lode of its ore, and the winze was apparently, as it must usually be, down the lode. The pay for getting out dead rock was but little beyond one-fourth that of getting out ore, and work in the rock outside of the lode was not contemplated. They testified, and the jury must have believed them, that the company reserved the power of determining when and where dangerous rock in the wall should be removed, if requiring removal by blasting, and of locating the supporting pillars or placing timbers to prop the wall. Such timbering would be expensive, and is not provided for by the contracts, which are confined to rock and ore blasting and removal. Either the mine must be unguarded, or else, on this state of facts, the company must guard it.

Under such circumstances it is very plain that the company, being the owners of the dangerous property, and inviting men to work on it, their responsibility for its protection cannot be changed by the fact that the work is done by the ton instead of by the day,

or by the fact that the men who contract with them have laborers of their own. By employing men to act for them in either way they hold out the assurance that they can work in the mine on the ordinary conditions of safety usually found in such places. They guarantee nothing more than is usual among prudent owners, and they do not insure against that which is purely accidental. But they do tacitly represent that they have not been and will not be reckless themselves.

If men choose with their own eyes open to run into danger they may forfeit claims to redress. But it cannot be considered reckless in men who are in doubt upon a matter which cannot be determined absolutely, to pay some regard to the opinions and assurances of those who are supposed to have and by their position are bound to have special knowledge called for by their larger responsibilities. In the present case the assurances of safety given by the mining agents cannot be disregarded, and were rightly subject to consideration by the jury.

We think the jury were very carefully and correctly instructed concerning their duty, and that there was testimony which warranted their verdict.

There is no error in the record, and the judgment must be affirmed with costs.

The importance of the point involved in the foregoing opinion will justify inviting attention to other cases more or less analogous. For convenience these will be classified under appropriate heads.

1. The owner of lands is under no obligation to protect trespassers against dangers in coming upon them. If, therefore, persons intentionally come upon his lands without his permission and without lawful right, and fall into pits or encounter other dangers, he is not responsible, even though he may have been grossly careless in leaving the pits uncovered or the other dangers unguarded: *Hounsell* v. *Smyth*, 7 C. B. N. S. 731; *Stone* v. *Jackson*, 16 C. B. 199; *Hunt* v. *London, &c., Railway Co.*, 1 Q. B. 277; *John* v. *Bacon*, Law Rep. 5 C. B. 437; *Vanderbeck* v. *Henry*, 34 N. J. 467; *Hargreaves* v. *Deacon*, 25 Mich. 1. This rule has been applied to children, who were tempted to meddle with exposed machinery, and were injured thereby: *Mangan* v. *Atterton*, Law Rep. 1 Exch. 239; *Wood* v. *School District*, 44 Iowa 27. Compare *Keefe* v. *Milwaukee, &c., Railroad Co.*, 21 Minn. 207. And to a servant, who fell through a scuttle when moving about for curiosity: *Severy* v. *Nickerson*, 120 Mass. 306.

2. But if one either expressly or by implication invites another upon his premises, for business or pleasure, or other reason, he by so doing assumes the duty to guard the other against dangers which might be encountered in accepting the invitation, or at least to warn the person invited of their existence, that he may avoid them. This point is strongly put in some cases, where persons have been injured in ap-

proaching the stations of railroad companies, by reason of their platforms or other approaches being out of repair: *Smith* v. *London, &c., Railway Co.*, Law Rep. 3 C. P. 326; *Tobin* v. *Portland, &c., Railroad Co.*, 59 Me. 183; *McDonald* v. *Chicago, &c., Railroad Co.*, 26 Iowa 124; *Mich. Cent. Railroad Co.* v. *Coleman*, 28 Mich. 440; *Chicago, &c., Railroad Co.* v. *Wilson*, 63 Ill. 167; *Swords* v. *Edgar*, 59 N. Y. 28. The obligation in this regard extends to those who come to welcome others, or to assist others in leaving: *Doss* v. *Missouri, &c., Railroad Co.*, 59 Mo. 27; but not to those who gather in a crowd to witness a passing parade, and are injured by the giving way of the platform: *Gillis* v. *Pennsylvania Railroad Co.*, 59 Penna. St. 129. It is said in this last case that if a traveller by foot on the open track of a railroad crosses a bridge which ought to be, but is not, in its ordinary use, strong enough to bear a locomotive and train of cars, and a rotten board breaks down under him, the company are not liable to him, for they owe him no duty. See further as to the general principle, *Bush* v. *Steinman*, 1 Bos. & P. 404; *Southcote* v. *Stanley*, 1 H. & N. 247; *Indermaur* v. *Dames*, Law Rep. 1 C. P. 274; s. c. Law Rep. 2 C. P. 181; *Chapman* v. *Rothwell*, E., B. & E. 168; *Francis* v. *Cockrell*, Law Rep. 5 Q. B. 184; *Elliott* v. *Pray*, 10 Allen 378; *Freer* v. *Cameron*, 4 Rich. 228; *Latham* v. *Roach*, 72 Ill. 179; *Sweeney* v. *Old Colony Railroad Co.*, 10 Allen 368; *Pierce* v. *Whitcomb*, 48 Vt. 127.

3. The duty not to expose others to unknown dangers on one's own premises is as much a duty to servants as to any others; for, though by their contract of service they take upon themselves all the risks properly incident to it, yet the negligence of the master is not one of these, and if he sends his servants into dangers to them unknown, and which they had no reason to look for, he will be held responsible for the consequences: *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572; *Grizzle* v. *Frost*, 3 Fost. & F. 622; *Bartonskill Coal Co.* v. *McGuire*, 3 Macq. H. L. 300; *Malone* v. *Hawley*, 46 Cal. 408; *Baltimore, &c., Railroad Co.* v. *Woodward*, 41 Md. 268; *Perry* v. *Marsh*, 25 Ala. 659; *Strahlendorf* v. *Rosenthal*, 30 Wis. 674; *Paulmeier* v. *Erie Railway*, 34 N. J. 151; *Illinois Central Railroad Co.* v. *Welch*, 52 Ill. 183; *Snow* v. *Housatonic Railroad Co.*, 8 Allen 441; *Lanning* v. *New York Central Railroad Co*, 49 N. Y. 521; *Louisville, &c., Railroad Co.* v. *Caven*, 9 Bush 559; *Coughty* v. *Globe Woollen Co.*, 56 N. Y. 124; *Bech* v. *Carter*, 68 Id. 283; *Deford* v. *Keyser*, 30 Md. 179; *Godley* v. *Hagarty*, 20 Penna. St. 387. The rule has been applied to a railroad company sending out cars upon a track blocked with snow and ice, in consequence of which plaintiff was injured: *Fifeld* v. *Northern Railroad Co.*, 42 N. H. 225.

4. Where one is doing work under a contract upon the land of another, the primary obligation to protect his laborers no doubt rests upon the contractor rather than upon the landowner, but this is liable to be controlled by circumstances. The obligation to give warning of all dangers not apparent, is one he owes to the contractor as much as to his own servants, and to those employed by the contractor to the same extent and for the same reasons. The duty is of course very plain where, as in the principle case, the landowner takes upon himself the obligation of watchfulness, and it then corresponds to that of a landlord who, in leasing premises, covenants to keep them in repair, and is held liable to third persons who are injured by his failure to keep the covenant: *Burdick* v. *Cheadle*, 26 Ohio (N. S.) 393; *Campbell* v. *Sugar Co.*, 62 Me. 552; *Owings* v. *Jones*, 9 Md. 108; *Grady* v. *Walsner*, 46 Ala. 381.

5. How far one may be liable to those who are injured in coming upon his premises under license of the law is a question not discussed in the books. Suppose, for example, that a traveller finds the highway impassible, and in passing around the obstruction on private grounds, as he lawfully may, he falls into an unguarded pit, can the owner of the land be held liable for his injury? Or an officer enters his house to serve a writ, and is precipitated through a trap-door, can the owner be made responsible as for negligence? The question is one of no little interest; for while the party injured is in the exercise of a legal right, it must be conceded that the other, as a general rule, may leave his premises in any condition he pleases, provided he does nothing, expressly or by implication, to bring others into danger upon them. It was held in *Laverone* v. *Maugianti*, 41 Cal. 138, that one who keeps a vicious dog, as a watch-dog, is liable to one who, by accident, is put within the dog's reach and is injured; but that was upon the ground that he had no right to keep the vicious dog at all. But doubtless a man may keep a dangerous dog upon his premises as lawfully as any other danger, if he gives due warning to those who might come within his reach: see *Sarch* v. *Blackburn*, 4 C. & P. 297; *Curtis* v. *Mills*, 5 Id. 489. But beyond any question, we should say, he would be liable to one who, visiting his premises by license of the law, should be assailed by a vicious animal of any sort, kept by the owner with knowledge of his vicious propensity: see *Blackman* v. *Simmons*, 3 C. & P. 138; *Sherfey* v. *Bartley*, 4 Sneed 58; *Loomis* v. *Terry*, 17 Wend. 496. T. M. C.

U. S. Circuit Court, Eastern District of Wisconsin.

B. LEIDERSDORF ET AL. *v.* J. G. FLINT.

The maker of a trade-mark is neither an author nor an inventor, and a trade-mark is neither a writing nor a discovery, within the meaning of the provision of the Constitution giving to Congress jurisdiction over the subject of copyrights and patents.

Congress, therefore, has no jurisdiction over the subject of trade-marks, and so much of title 60 of the Revised Statutes as relates to trade-marks is unconstitutional and void.

IN Equity. This was a bill for an injunction to restrain an alleged infringement by defendant of complainants' trade-mark, used upon packages of tobacco, and registered according to act of Congress. Both complainants and defendant were citizens of Wisconsin, and the bill was based upon that provision of section 4942, Revised Statutes, which gives to a party aggrieved by the wrongful use of his trade-mark, a remedy by injunction, according to the course of equity, in any court having jurisdiction over the person guilty of such wrongful use, and was filed upon the theory that this court had jurisdiction to entertain such a bill, though both parties are citizens of the same state.